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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA,
SAN FRANCISCO DIVISION

GUARDANT HEALTH, INC.

Plaintiff and
Counterclaim-Defendant,

vs.

NATERA, INC.

Defendant and
Counterclaim-Plaintiff.

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CASE NO. 3:21-CV-04062-EMC

**NATERA, INC.'S OPPOSITION TO
GUARDANT'S MOTION FOR
SANCTIONS WITH RESPECT TO THE
EXCHANGE OF CLOSING
DEMONSTRATIVE SLIDES**

1 Rather than litigating the merits of the case, Guardant continues to try to gain advantage
 2 through yet another frivolous sanctions request. Indeed, this is the fifth time during this trial that
 3 Guardant has asked the Court to “dock” or “reallocate” Natera’s time. Day 7 Trial Tr. 1446:6-
 4 1447:4 (“I think the Court should issue a sanction and give us an hour of their time... I’m suggesting
 5 shifting an hour from their side to our side”); Dkt. 803 (Guardant requests “allotting some of
 6 Natera’s time to Guardant”), *see also* Day 5 Trial Tr. 1057:18-1058:9, 1146:1-3. But there is no
 7 basis for Guardant’s request for draconian sanctions that would deprive Natera of mounting any
 8 meaningful defense to Guardant’s claims for nearly \$170 million, and its refusal to engage in any
 9 good faith meet and confer discussions regarding Natera’s closing demonstratives directly
 10 contravenes the Court’s clear guidelines. Day 8 Trial Tr. 1952:22-1955:12 (directing parties to work
 11 out schedule regarding resolution of any disputes on demonstratives).

12 Natera Discloses All Of Its Closing Slides: The parties agreed that they would exchange
 13 closing demonstratives at 6:30 p.m. on Wednesday, November 20th. As Natera’s counsel explained,
 14 Natera understood “this to mean that a slide with a witness’s picture and a transcript excerpt would
 15 not need to be disclosed[.]” 11/18/24 Landes email. In response, Guardant wrote back that “if there
 16 is a heading or other characterization of the testimony, then the slides must be disclosed.” 11/19/24
 17 Hanson email.

18 Out of an abundance of caution and to avoid disruptive objections during its closing
 19 presentation, Natera disclosed *all* of the closing slides it might use at the agreed upon time. Two-
 20 thirds of Natera’s slides were simply callouts of jury instructions, verdict form, admitted exhibits or
 21 testimony excerpts with witness pictures. Guardant did not disclose any slides that contained jury
 22 instructions, verdict forms, admitted exhibits, or testimony. This was the primary contributor to
 23 Natera’s disclosure being larger than Guardant’s.

24 Also contributing to the total number of slides was the fact that Natera’s closing argument
 25 will need to respond to Guardant’s closing argument, and, of course, Natera does not know what
 26 testimony or exhibits Guardant will use, or what arguments it will make. Indeed, Natera was forced
 27 to disclose potential rebuttal slides to the numerous irrelevant issues Guardant has centered this trial
 28 around (*e.g.*, inaccurate characterizations about patient access, delays in Medicare, patients without

1 tissue). *See e.g.*, Day 4 Trial Tr. 748:23-749:21 (Guardant’s CEO telling the jury that “many, many
 2 tens of thousands of patients who may not be alive today because they didn’t get access to this type
 3 of testing” due to Natera’s “poisonous campaign”).

4 Guardant Refuses To Meet And Confer Regarding Closing Slides: Seizing on the disparity
 5 between the number of slides, Guardant refused to meet and confer. Although the parties had
 6 scheduled a meet and confer at 9:00 p.m. on Wednesday night, Guardant canceled the call not
 7 because of any issue with the substance of Natera’s slides (which Guardant claimed it did not
 8 review), but because Guardant believed Natera had disclosed too many slides.¹

9 Natera’s disclosure of these slides gives Guardant a distinct advantage, as it previews
 10 precisely the arguments that Natera may make during closing. Guardant, by contrast, disclosed no
 11 testimony slides and no exhibit call outs, leaving Natera to guess which arguments Guardant may
 12 make at closing. Because Natera is going second, and will necessarily need to respond to Guardant’s
 13 arguments, it requires greater flexibility in its presentation. *See* Day 6 Trial Tr. 1198:18-19 (Court
 14 noting this “is a complicated case with complicated issues.”). Additionally, the fact that this case
 15 involves both Guardant’s claims and Natera’s counterclaims makes it inevitable that the number of
 16 potential issues raised is greater than a case with only one set of claims. Nevertheless and while
 17 Natera’s original disclosure was in good faith, Natera immediately went to work to address
 18 Guardant’s complaint based on the number of slides disclosed so that the parties could engage in a
 19 productive meet and confer and re-focus their attention on preparing for closing presentation.

20 Natera Makes A Second Disclosure But Guardant Continues To Refuse To Meet And
 21 Confer: Within hours, Natera disclosed an amended slide deck. Like the first, this disclosure
 22 contained numerous slides that did not need to be exchanged per the parties’ agreement, but were
 23 included for transparency, completeness, and to avoid disruptive objections during closing. The
 24 amended deck included 68 testimony slides, 60 slides of admitted exhibits, and 13 transition slides.

25 Rather than meet and confer in good faith on Natera’s revised closing deck, however,
 26 Guardant’s counsel instead chose to spend its time drafting a motion for sanctions. In that motion
 27

28 ¹ Natera nevertheless sent its objections to Guardant’s slides that evening as planned.

1 and despite expressly demanding that Natera provide an amended deck, Guardant highlighted
2 objections it had to slides in Natera's *original* closing deck (all but two of which were *removed* in
3 the amended deck), choosing to raise those objections with the Court in the first instance, rather than
4 engage in *any* meet and confer process with Natera.

5 During the parties' 9:00 am meet and confer today, Natera's counsel asked Guardant whether
6 it had any objections to Natera's slides that it wished to raise. Guardant's counsel responded only
7 by pointing to the sanctions motion that it had filed a few minutes earlier. When asked whether
8 there were specific slides that Guardant wished to discuss, Guardant refused. When pressed as to
9 why Guardant was unwilling to meet and confer on Natera's slides, Guardant's counsel announced
10 that the call was over, and hung up on Natera's counsel.

11 Guardant's Identified Objections Have Been Resolved: Ultimately, Guardant's motion only
12 identifies objections to five slides. Because Guardant inexplicably chose to address Natera's
13 original slide deck in its sanctions motion, rather than the amended deck that Guardant itself
14 demanded, all but two of its objections were entirely moot. Had Guardant met and conferred with
15 Natera, it would know that Natera has also agreed to amend those two slides to resolve those two
16 objections.

17 More specifically, Guardant objected to Slide 220 on the grounds that it included a citation
18 to exhibits that were not admitted. Mot. at 1. To resolve that complaint, Natera replaced TX-736
19 with TX-133, which is a duplicate exhibit that has been admitted. Guardant also disagreed with the
20 footnote citation in Slide 267. *Id.* To resolve that complaint, Natera removed the citations to Dr.
21 Stec's report and exhibits, and instead cited to the trial transcript. Guardant did not raise any further
22 objections to any of the slides in Natera's closing deck in its motion or during the meet and confer.

23 However, at 11:23 a.m. this morning Guardant raised a handful of additional objections to
24 Natera's slides for the first time. The parties have had no opportunity to confer about these given
25 Guardant's late assertion of these objections, but they are baseless. Guardant objects to Natera's
26 slides 8-12 and 37-40 on the basis that these slides supposedly suggest that Guardant's
27 communications with MolDX were ads, or improperly attack Guardant's submissions to MolDX,
28 but these slides (which are almost all simply callouts of testimony or admitted exhibits); they do

1 not. Instead, these slides simply note that Guardant admitted internally that the performance figures
2 it submitted to MolDX—which were the same figures as those in Natera’s at-issue false
3 advertisements—were unsupported or “not clinically meaningful.” Most slides rely on TX-1369
4 and the testimony about it, and the Court already overruled Guardant’s objections on this point. Day
5 5 Trial Tr. 958:2-18.

6 Guardant Raises Unrelated Trial Conduct: In an attempt to bootstrap its meritless
7 accusations of bad faith relating to the closing demonstratives, Guardant’s motion also includes a
8 litany of unrelated issues from throughout the trial. Natera disagrees with Guardant’s
9 characterizations of these issues, none have anything to do with the current dispute regarding closing
10 demonstratives.

11 Guardant has consistently weaponized the Court’s procedure for raising and resolving
12 disputes about exhibits and demonstratives into a basis for sanctions throughout this trial. With
13 respect to Dr. Metzker’s slides (Mot. at 4-5), after Natera disclosed demonstratives for use with Dr.
14 Metzker, Guardant objected to nearly every slide in Dr. Metzker’s demonstrative, claiming they
15 contained legal conclusions when, in fact, they simply reflected Dr. Metzker’s opinions. Similarly,
16 with regards to exhibits, Guardant asserted scope objections to documents that were plainly cited in
17 Dr. Metzker’s expert report. Natera continually pointed out to where the opinions and documents
18 were disclosed in Dr. Metzker’s report, but this did nothing to sway Guardant from standing on its
19 baseless objections. Nevertheless, Natera subsequently withdrew slides to address Guardant’s
20 objections. Natera then further withdrew or modified the objected-to demonstratives for use with
21 Dr. Metzker after further discussion with Guardant the next day in an attempt to minimize the
22 disputes raised with the Court. Natera’s withdrawal or modification in response to Guardant’s
23 objections is exactly the type of good faith behavior the Court expects of the parties. And all of this
24 was done to avoid having to burden the Court with disputes over this material. Yet, in response and
25 as part of the playbook that it is employing again here, Guardant refused to consider Natera’s
26 narrowed demonstratives and instead brought frivolous objections to the Court. *See* Day 7 Trial Tr.
27 1436:7-1441:9 (Guardant objecting to Dr. Metzker’s opinions as outside the scope of his reports and
28 the Court ruling “Well, it’s in there,” after Natera pointed out the paragraphs in Dr. Metzker’s report

1 previously cited to Guardant during the meet-and-confer).

2 With respect to the disclosure of Interrogatory No. 25 (Mot. at 5), on the evening of
3 November 14, Natera provided notice that it intended to read in Interrogatory No. 25 and seek to
4 admit the four exhibits it authenticated, all of which were in the same form, and one of which had
5 already been admitted into evidence. The Interrogatory was intended to be read prior to the close
6 of Natera's case on November 18. Yet without any effort to meet and confer with Natera's counsel,
7 Guardant immediately raised the timing of the disclosure with the Court the following morning.
8 Natera offered on the afternoon of Friday, November 15 to meet and confer to narrow any objection
9 before Monday, but Guardant declined.

10 Finally, Guardant's characterization of the trial examination and testimony counsel sought
11 to elicit, as well as the scope of what the Court's orders have precluded, is inaccurate. Mot. at 3.
12 The Court expressly precluded further discussion of these issues on Monday, November 18th,
13 instead stating they would be addressed at a later date. Day 8 Trial Tr. 1890:20-1891:4. Guardant's
14 injection of them into this brief is improper, and Natera looks forward to addressing them fulsomely
15 at the appropriate time.

16 Guardant is represented in this trial by not one but two law firms, one of which has more
17 than 800 attorneys. They found time to file an unauthorized trial brief yesterday challenging an
18 exhibit after the close of evidence. They found time to file a sanctions motion without once
19 communicating to Natera their objections to specific closing slides. But they did not find time to
20 meet and confer with Natera either last night or this morning, nor to send Natera any written
21 objections to the slides. Instead, Guardant referred Natera to its sanctions motion as the source of
22 information about their objections. This is not good faith conduct.

23 CONCLUSION

24 Guardant seeks nearly \$170 million in damages in this action. Yet its request for sanctions—
25 that Natera lose nearly all of its closing time and be precluded from using any demonstratives—
26 would effectively preclude Natera from mounting any defense to Guardant's case. These draconian
27 sanctions have nothing to do with the actual conduct complained of and would severely and unfairly
28 prejudice Natera. *See* Day 7 Trial Tr. 1445:25-1446:21 (Court refusing Guardant's request to take

1 time from Natera to give to Guardant, including because the complained-of conduct had “nothing
2 to do with time that was used in [] the courtroom in examining witnesses”). Sanctions are not
3 warranted, and Guardant’s continued attempts to seek them should not be entertained.

4
5 DATED: November 21, 2024

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7
8 By /s/ Victoria F. Maroulis

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